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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN GLEN ATWATER et al., Defendants and Appellants.	D074043 (Super. Ct. Nos. 16CR-024652, 16CR-027229, 16CR-024650)

APPEAL from a judgment of the Superior Court of San Bernardino County, John M. Tomberlin, Judge. Judgment affirmed; remanded with directions to correct abstract of judgment as to defendant Elliott.

Erica L. Gambale, under appointment by the Court of Appeal, for Defendant and Appellant Steven Atwater.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Clifford D. Elliott.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendants Steven Glen Atwater and Clifford Dewey Elliott appeal from their judgments of conviction after a jury trial. Both men were charged with and convicted of arson of property. On appeal, the defendants jointly argue that the evidence at trial was insufficient as a matter of law to support a conviction for arson of property, in violation of Penal Code[1] section 451, subdivision (d).

Atwater separately contends that the trial court committed prejudicial error in instructing the jury on the legal principles regarding arson of property, and that, given that there was insufficient evidence to support his conviction in this case, the trial court's order revoking Atwater's probation in a separate case must also be reversed and remanded to the trial court to reimpose probation.

Elliott separately requests that this court independently review the transcript and the records that the trial court reviewed during its in camera *Pitchess*[2] hearing, to determine whether he was entitled to the release of additional information beyond the limited discovery that the trial court granted with respect to the officer's personnel

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1 Further statutory references are to the Penal Code unless otherwise indicated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

history. Elliott also argues that the abstract of judgment issued in his case must be amended to provide that the restitution obligation that the court imposed is joint and several.

In addition, after this appeal was fully briefed, Elliot requested leave to file a supplemental brief to argue that, pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393), he is entitled to remand for resentencing to allow the trial court to exercise its discretion to strike a five-year prior serious felony enhancement. S.B. 1393 amends sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. We granted Elliott's request to file his supplemental brief and allowed the People to respond to Elliott's argument.

We conclude that the defendants' arguments are without merit, with two exceptions. The People concede, and we agree, that the abstract of judgment issued in Elliott's case must be amended to provide that the restitution obligation is joint and several as to Atwater and Elliott. We also conclude that Elliott is entitled to resentencing to allow the trial court to exercise its discretion as to whether to strike or impose the five-year prior serious felony enhancement. We therefore affirm the judgment in all respects as to defendant Atwater. We affirm the judgment of conviction as to defendant Elliott, but vacate the sentence and remand for resentencing, as well as for the purpose of having the trial court issue an abstract of judgment clarifying that the restitution obligation is joint and several as to both defendants.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution's case*

On March 4, 2016, at about 1:30 a.m., D.C., the person whose property was set on fire, was at his home in Big River with his housemate, their respective children and several friends. D.C.'s "travel trailer and camper" was located on the property. He worked in the trailer and used it for storage.

D.C. and his housemate were inside the residence when they noticed Atwater and Elliott approach the front door on a home surveillance system monitor. D.C. and his housemate had known Atwater and Elliott for several years. D.C.'s housemate saw that Elliott was carrying a club or ax handle. D.C. had previously had a conflict with Elliott, and no longer allowed Elliott onto his property. At one point in time, Elliott had threatened to burn down the trailer, and said that he hoped that D.C. or his housemate would be in it when it burned.

D.C. went to the front door where his friend, C.W., was talking with Atwater and Elliott. After C.W. spoke with the two men for a few seconds, Atwater and Elliot left. A few minutes later, D.C. and his housemate observed a "flash of light" on the surveillance monitor—something that looked like a "cocktail" of fire being thrown at D.C.'s trailer.

D.C. ran outside. He saw one person running away. D.C. and his friends worked to put out the fire, using garden hoses. After the fire was out, D.C. went back inside the residence and was "relaxing" "[f]or a few, [or] a couple minutes." However, soon after

he went back inside, which was approximately 30 minutes after the start of the first fire, D.C. saw smoke, and then more fire in the area of the trailer. This time when D.C. went outside, he saw two people running away from the area. He believed that the persons he saw running away were Atwater and Elliott. D.C.'s housemate saw one person running away. She believed that person was Elliott.

At the time of the fires, the trailer was connected to an extension cord that provided it with electricity. D.C. disconnected the electrical cord after the fires were extinguished.[3]

As a result of the fire, a large portion of the right side of the trailer was burned. The aluminum siding on the trailer was melted, as were various other areas of the travel trailer. Another fire appeared to have burned the trailer's rear tail light assembly. A Sheriff's Department investigation indicated that the fire had originated in two separate locations. One location was near the right, rear side of the trailer; this location had been ignited through the use of a flammable liquid that had been splashed onto the side of the trailer and set on fire through "an open flame device." A secondary fire in the tail light assembly had also been ignited with an open flame, such as a cigarette lighter or a match; it was possible that a flammable liquid had also been used at that location.

When questioned by a sheriff's detective, appellant Elliott initially denied having been on D.C.'s property on the day of the fire.

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3 It is not clear from the testimony whether the victim disconnected the electricity after he put out the initial fire, or whether he did so after putting out the second fire.

2. *The defense*

D.C.'s friend, C.W., spoke briefly with Atwater and Elliott at the door of D.C.'s home on the night of the fire. When Atwater and Elliott started to walk away, C.W. followed them. Atwater and Elliott walked approximately 20 yards away from the house, outside of the property line. C.W. then returned to the home to say that he was leaving. As C.W. entered the home, D.C. ran outside, yelling about a fire.

C.W. again left the home and walked to the property line, where he saw Atwater and Elliott still standing. C.W. saw the flames from the fire. He and Atwater and Elliott then walked farther away from the property line. C.W. had not seen Atwater or Elliott move away from where they had been standing, outside the property line, before the fire erupted.

3. *Procedural background*

The San Bernardino County District Attorney's Office filed an information against each defendant charging each with arson of property of another (§ 451, subd. (d); count 1). The information filed against Elliott also alleged that, with respect to count 1, Elliott had suffered a prior serious felony conviction, within the meaning of sections 1170.12, subdivisions (a)–(d) and 667, subdivisions (b)–(i), and section 667, subdivision (a)(1).

A jury found each defendant guilty of arson of property of another as charged against each in count 1 of their respective informations. Following a bifurcated trial on the enhancement allegations against Elliott, the trial court found the allegations true.

The trial court sentenced Atwater to a total term of four years eight months in state prison, which consisted of a term of three years in the current case, to be served concurrently with a term of four years eight months in case number 16CR-027229. The trial court sentenced Elliott to a total term of 11 years in state prison. The 11-year term included an upper term sentence of 6 years for the arson count, plus a 5-year prior serious felony conviction enhancement imposed pursuant to section 667, subdivision (a)(1).

Both defendants filed timely notices of appeal. The defendants' appeals were consolidated by order of Division Two of the Fourth District Court of Appeal, and the matter was later transferred to Division One for disposition.

III.

DISCUSSION

A. *Substantial evidence supports the jury's verdicts regarding arson of property*

Atwater and Elliott contend that there is insufficient evidence to support their convictions for arson of property (§ 451, subd. (d)) because the trailer to which they set fire, they assert, was a "structure," and a "structure" is specifically excluded from the statutory definition of "property."

1. *Standard of review*

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the

judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738–739.)

2. *Governing law*

The relevant statutory provision at issue in this case, section 451 provides:

> "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.
>
> "(a) Arson that causes great bodily injury is a felony punishable by imprisonment in the state prison for five, seven, or nine years.
>
> "(b) Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.
>
> "(c) Arson of a structure or forest land is a felony punishable by imprisonment in the state prison for two, four, or six years.
>
> "(d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.

> "(e) In the case of any person convicted of violating this section while confined in a state prison, prison road camp, prison forestry camp, or other prison camp or prison farm, or while confined in a county jail while serving a term of imprisonment for a felony or misdemeanor conviction, any sentence imposed shall be consecutive to the sentence for which the person was then confined."

Definitions of many of the terms used in section 451 are provided in section 450. For example, subdivision (a) of section 450 defines a " '[s]tructure' " to mean "any building, or commercial or public tent, bridge, tunnel, or powerplant."[4] Subdivision (b) of section 450 defines " '[f]orest land' " to mean "any brush covered land, cut-over land, forest, grasslands, or woods." And subdivision (c) of section 450 defines " '[p]roperty' " as being "real property or personal property, *other than a structure or forest land*." (Italics added.) Thus, "property" for purposes of the arson statute is a catch-all provision covering all types of real and personal property, with the exception of structures and one particular type of real property—i.e., forest land.

3. *Application*

The defendants contend that the evidence presented with respect to the travel trailer at issue in this case is "insufficient to establish [that the] trailer was 'property' within the meaning of Penal Code section 451, subdivision (d)," as charged in the informations. They argue, instead, that the trailer was "fixed in place, connected to an electrical source, and used [as] a storage facility filled with and surrounded by miscellaneous items," and further assert that it "had four walls, a roof, . . . a floor" and "at

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4 "The Penal Code does not define 'building' for purposes of arson; we therefore apply the plain meaning of the word. [Citation.]" (*People v. Labaer* (2001) 88 Cal.App.4th 289, 292 (*Labaer*).)

least one window"; according to the defendants, these factors "establish[ ]" that the trailer was a "structure," and was thus not "property" within the meaning of the statute.[5] The defendants further argue that because the trailer had been used as a residence, and because D.C. used the trailer as a "storage facility and sometimes a workspace," it should be considered to be a "structure." The defendants contend that because they were each charged and convicted of arson of property, and not arson of a structure, their convictions must be reversed.

However, the definition of "structure" in section 450, subdivision (a) is not based on the purpose or function of the thing at issue; rather, a structure is defined simply as "any building, or commercial or public tent, bridge, tunnel, or powerplant." Indeed, a person might live in a car or truck, but that does not cause a car or a truck to become a "structure." Rather, the feature of items that may constitute a "structure" have in common is a level of permanence or semi-permanence (as may be involved with a "commercial or public tent"), not their function.

We disagree with the defendants' suggestion that the evidence pertaining to the trailer demonstrates that it was a "structure." In fact, the evidence established that the trailer at issue was approximately 22 to 24 feet in length and eight feet wide, and had rear tail lights. The jury was shown photographs of the trailer. D.C. referred to the trailer as a "travel trailer and camper," as well as his "vehicle," and repeatedly referred to it as a "trailer" throughout the trial. The references to the thing that was burned being a "trailer"

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[5] Notably, the brief in which the assertion that the trailer was fixed in place contains no record references with respect to that contention.

is testimony from which one could reasonably infer that the item was not fixed in place, and that it was not intended to be permanently affixed in place.[6] Further, although the defendants point out that the trailer was connected to an electrical source, presumably to suggest that it was permanently affixed to the ground in a manner similar to how a building is affixed, the evidence demonstrates that the electrical connection was not a permanent connection, but instead, involved a cord plugged into an outlet located outside of the trailer. Indeed, at the time of the fire, the "plug . . . that's used for bringing electricity to this trailer" had "been pulled out," such that "[t]here was no electricity to the trailer" at the time of the fire. From all of this evidence, the jury could have reasonably concluded that the trailer at issue was not affixed to the ground, and that it was therefore not a structure, but was instead, personal property.

We also reject the defendants' reliance on *Labaer* in support of their contention that the evidence is insufficient to support their convictions for violating section 451, subdivision (d)—arson of *property*. In *Labaer*, the defendant argued that the mobile home he had partially dismantled and then set on fire was "property" under the arson statute, and was not a building; the defendant therefore claimed that he should not be subject to the increased punishment for arson of a structure. (*Labaer*, *supra*, 88 Cal.app.4th at p. 292.) In rejecting the defendant's claim, the court observed, "Labaer

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6 There was no evidence presented that would contradict the common understanding of a trailer as a vehicle that may be pulled behind another vehicle (see, e.g., Webster's Third New International Dictionary (2002) at page 2424 [definition of "trailer" includes "a vehicle or one in a succession of vehicles hauled usu. by some other vehicle . . . "]), and that would therefore suggest that this particular trailer was fixed in one location or that it was intended to be fixed in one location.

does not dispute that the mobilehome—as it existed during the months before the fire—constituted a 'building' [and therefore a structure] under the arson statutes. The evidence established the [mobile]home was fixed to a particular location, could not be readily moved, and had been used as Labaer's residence for several months." (*Ibid.*)

The defendants contend that the "facts here are similar to those in *Labaer*." They assert that the "trailer was a standing structure with four sides, a roof, and a floor," and that "[l]ike the mobile home in *Labaer*, individuals could enter this trailer and walk through its interior." Although there may be some common characteristics of the mobile home at issue in *Labaer* and the trailer at issue in this case, there are also a number of characteristics that differ. Most significantly, the mobile home at issue in *Labaer* was fixed to the land and "could not be readily moved." The evidence in this case demonstrates that, in contrast to the facts in *Labaer*, a fact-finder could readily determine that the trailer that the defendants set fire to was not affixed to the land and was readily moveable. Given that the things identified as constituting a "structure" for purposes of the arson statute share the fact that they tend to be fixed to the land in some level of permanence and are not readily moveable, the difference between the moveability of trailer here and the permanence of the mobile home in *Labaer* is significant. We therefore reject the suggestion that the trailer in this case was similar to the mobile home at issue in *Labaer*, and we further reject the defendants' contention that the evidence is insufficient to establish that the trailer was, as a matter of law, property "other than a structure."

B. *The trial court did not err in instructing the jury with respect to the law governing arson of property*

Atwater argues that the trial court erred in instructing the jury with CALCRIM No. 1515 because the instruction failed to inform the jury that the term "property" meant property other than a structure. Atwater contends that the instruction that the court provided "erroneously defined property" by failing to include the provision that the property must be something "other than a structure."

1. *Additional background*

The trial court instructed the jury with CALCRIM No. 1515, the form instruction on arson. The form instruction provides bracketed options from which the court may select depending upon whether a defendant has been charged pursuant to section 451, subdivision (c) (arson of a structure or forest land), or subdivision (d) (arson of property other than a structure or forest land). Here, the court utilized certain of the bracketed options and instructed the jury with respect to arson in relevant part as follows:

> "The defendants are charged with arson.
>
> "To prove that a defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant set fire to or burned or helped the burning of property;
>
> "AND
>
> "2. He acted willfully and maliciously.
>
> "To *set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.
>
> "[¶] . . . [¶]

"*Property* means personal property or land other than forest land."[7]

Atwater's defense counsel did not object to the instruction, nor did counsel ask for a modification to the instruction or for further clarification of the instruction.

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[7] The form CALCRIM No. 1515 instruction, including all bracketed options, is as follows:

> "The defendant is charged [in Count ___] with arson [in violation of Penal Code section 451(c/d)].
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant set fire to or burned [or (counseled[,]/ [or] helped[,]/ [or] caused) the burning of] (a structure/forest land/property); AND
>
> "2. (He/She) acted willfully and maliciously.
>
> "To set fire to or burn means to damage or destroy with fire either all or part of something, no matter how small the part.
>
> "Someone commits an act *willfully* when he or she does it willingly or on purpose.
>
> "Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.
>
> "[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]
>
> "[Forest *land* means brush-covered land, cut-over land, forest, grasslands, or woods.]
>
> "[*Property* means personal property or land other than forest land.]
>
> "[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.]"

2. *Relevant legal standards*

"In criminal cases, a trial court must instruct sua sponte on the ' " 'general principles of law relevant to the issues raised by the evidence,' " ' that is, those principles ' " 'closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' " ' [Citation.] By contrast, ' "pinpoint" ' instructions 'relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' [Citation.]" (*People v. Hill* (2015) 236 Cal.App.4th 1100, 1118–1119)

We review de novo a defendant's claim that the trial court's jury instructions did not correctly or adequately state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

3. *Application*

The court utilized the form instruction, CALCRIM No. 1515. Contrary to Atwater's argument, that instruction is not erroneous for not including the "other than a structure" language from the definition of "property" provided in subdivision (c) of section 450. CALCRIM No. 1515 generally follows the text of the arson statute—i.e., section 451—setting forth the general principles of law that relate to the offense charged pursuant to that section. CALCRIM No. 1515 provides the statutory definition of "property" as provided in section 451, and does not require further clarification.

To the extent that Atwater believed that the instruction was incomplete, he may not now complain that the instruction, which is otherwise legally correct and responsive

to the evidence, was incomplete for failing to include additional language about the meaning of property, because he did not request such clarifying language.[8] " 'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citations.]" (*People v. Landry* (2016) 2 Cal.5th 52, 99–100.)

In any event, even if we were to assume that the court should have included the phrase "other than a structure" after the words "personal property" in the definition provided to the jury (i.e., "Property means personal property other than a structure as well as land other than forest land"), we nevertheless would conclude that Atwater was not prejudiced by the absence of this language because it is not reasonably probable that Atwater would have received a more favorable result if the jury had been so instructed. (See *People v. Jones* (2012) 54 Cal.4th 1, 53 [applying standard of prejudice of *People v. Watson* (1956) 46 Cal.2d 818 to instructional error].) Specifically, even if the jury had been told that the property that was set on fire had to be property other than a structure, we are convinced that the jury would have nevertheless concluded that the moveable

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[8] At trial, there was never any dispute as to whether the trailer in question was property or was a structure under the arson statute; all parties proceeded under the theory that the trailer was property. The offense of arson of a structure carries a more severe punishment than the offense of arson of property, which likely explains why trial counsel never raised the possibility that the trailer was a structure rather than property. It is somewhat ironic that appellate counsel argues on appeal that Atwater is guilty of arson of a *structure*, the more strictly punished offense, rather than arson of property, the less strictly punished offense, and that his conviction for arson of property must be reversed, without the possibility of retrial, on this ground.

trailer was not a structure, and instead, was D.C.'s personal property. As we have previously explained, the evidence in this case does not support a finding that the trailer was a structure within the meaning of the arson statute. Thus, there is no reasonable probability that the jury would have found Atwater to have been not guilty of arson of property had they been instructed, as Atwater advocates, that property is real or personal property other than a structure.

C. *Atwater is not entitled to reversal of the court's revocation of his probation in case No. 16CR-027229*

Atwater contends that, given his argument that there is insufficient evidence to support his conviction for arson of property, as opposed to arson of a structure, the trial court erred in revoking his probation in San Bernardino Super Court case No. 16CR-027229. However, as we have concluded in part III.A, *ante*, substantial evidence supports the jury's verdict that Atwater is guilty of arson of property, under section 451, subdivision (d). Therefore, there is no merit to Atwater's contention that the trial court's revocation of probation in the San Bernardino case, based on his arson conviction in this case, must be reversed.

D. *This court has reviewed the sealed transcript and has found no error in the court's ruling with respect to Elliott's Pitchess motion*

Elliott requests that this court conduct an independent review of the sealed documents that the trial court reviewed in response to Elliott's *Pitchess* motion. The People agree that Elliott is entitled to such review.

In *People v. Gaines* (2009) 46 Cal.4th 172, 179, the Supreme Court summarized the manner by which a party may discover evidence in confidential police officer personnel records under *Pitchess* and its progeny:

> "[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both ' "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.] If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], 'the trial court should then disclose to the defendant "such information [that] is relevant to the subject matter involved in the litigation." ' "

On appeal, this court is required to review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose the contents of the officers' personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229; see *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

In this case, after reviewing the relevant personnel records of the officer as to whom the *Pitchess* motion was directed, the trial court disclosed relevant evidence related to a single event. We have examined the personnel records reviewed by the trial court and conclude that the court did not abuse its discretion in denying further discovery of additional personnel records.

E. *The abstracts of judgment must be amended to reflect the court's judgment that the defendants are jointly and severally liable for the victim restitution amount*

Elliott contends that his abstract of judgment should reflect that Elliott and Atwater are jointly and severally liable for the victim restitution that the court ordered, consistent with the trial court's oral pronouncement. At sentencing, when the court was pronouncing Atwater's sentence, the court stated, "I'm going to order he will pay $8,095 for the actual restitution to [D.C.] . . . [T]hat payment will be joint and several with his co-defendant, Mr. Elliott . . . ." The People agree that the trial court's victim restitution order was joint and several, and concede that both defendants' abstracts of judgment should reflect joint and several liability. We also conclude that it is apparent from the record in this case that the court's intended judgment was that the two defendants be jointly and severally liable for the victim restitution amount. Atwater's abstract of judgment reflects the order of joint and several liability, but Elliott's does not. We will therefore direct the trial court to issue an abstract of judgment with respect to Elliott that reflects that Elliott and Atwater are jointly and severally liable for the victim restitution ordered in this case.

F. *Elliott is entitled to have the trial court exercise its discretion as to whether to impose or strike a five-year prior serious felony enhancement, under a new provision of law*

On September 30, 2018, the Governor signed S.B. 1393 which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.)

Under the previous versions of these statutes, the trial court was *required* to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

Elliott contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing based on a prior serious felony conviction, provided that the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019. He contends that remand for a new sentencing hearing is required in such cases. The People concede that "the new law would apply to [Elliott] retroactively," although the People further argue that remand for resentencing in this case is "unwarranted" because the trial court's statements at sentencing demonstrate that the court would not have dismissed the five-year enhancement even if it had discretion to do so at the time the enhancement was imposed.

In *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*), another division of this district held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Id*. at p. 973.) We agree with the *Garcia* court's analysis, as well as the court's conclusion, and we therefore accept the People's concession that the amendments of S.B. 1393 apply retroactively to Elliott's case.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is not required, however, if "the records shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid*.)

The People contend that remand is not required in this case because the record demonstrates that the trial court would not have stricken the five-year prior serious felony enhancement, even if it had possessed discretion to do so. In this regard, the People note that the trial court stated that Elliott's " 'record, separate from the strike, just cries out for nothing less than the aggravated term,' " and that the trial court denied the defendant's *Romero* motion to dismiss his prior strike. However, with respect to the five-year prior serious felony enhancement, specifically, the trial court's only comment was the following: "I'm going to sentence you to a separate consecutive five years for the 667(a)(1) prior. Total is 11 years in the state prison." On this record, we cannot conclude that the trial court would not have stricken the five-year prior serious felony enhancement if it had possessed the discretion to do so.

We therefore conclude that remand is appropriate to allow the trial court to resentence Elliott and to exercise its new discretion with respect to whether to strike the five-year prior serious felony enhancement.[9]

IV.

DISPOSITION

The judgment as to Atwater is affirmed (case Nos. 16CR-024652, 16CR-027229). The judgment of conviction as to Elliott (case No. 16CR-024650) is affirmed. However, the sentence in case No. 16R-024650 is vacated, and the matter is remanded for resentencing. Upon resentencing, the court shall consider whether to exercise its discretion to strike the 5-year prior serious felony enhancement. The trial court is also directed to prepare a new abstract of judgment in case No. 16CR-024650 that reflects that the victim restitution is to be paid jointly and severally by Elliott and Atwater, and is further directed to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.

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9 We do not intend to suggest that the trial court should exercise its discretion to strike the enhancement at issue here; we make no comment on the propriety of such a decision. We remand solely to allow the trial court the opportunity to exercise its discretion.